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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/887,836	06/22/2001	James S. Bradley	CFP-31802/02	7856
7590	11/04/2003		EXAMINER	
Avery N. Goldstein Gifford, Krass, Kroh, Sprinkle, Anderson & Citkowski, P.C. 280 N. Old Woodward Avenue, Suite 400 Birmingham, MI 48009-5394			AUGHENBAUGH, WALTER	
			ART UNIT	PAPER NUMBER
			1772	
			DATE MAILED: 11/04/2003	//

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	09/887,836	BRADLEY, JAMES S.
Examiner	Art Unit	
Walter B Augenbaugh	1772	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

1)  Responsive to communication(s) filed on 12 August 2003.

2a)  This action is **FINAL**.                    2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## **Disposition of Claims**

4)  Claim(s) 1-5, 11 and 12 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 1-5, 11 and 12 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are: a)  accepted or b)  objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)  The proposed drawing correction filed on \_\_\_\_\_ is: a)  approved b)  disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)  The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)  All b)  Some \* c)  None of:

1.  Certified copies of the priority documents have been received.
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

14)  Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a)  The translation of the foreign language provisional application has been received.

15)  Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1)  Notice of References Cited (PTO-892)      4)  Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_ .  
2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)      5)  Notice of Informal Patent Application (PTO-152)  
3)  Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ .      6)  Other: \_\_\_\_\_ .

## **DETAILED ACTION**

### ***Acknowledgement of Applicant's Amendments***

1. The amendment made in the specification in the Amendment filed August 12, 2003 (Paper 10) has been received and considered by Examiner.
2. The amendments made in claims 2 and 12 in the Amendment filed August 12, 2003 (Paper 10) have been received and considered by Examiner.

### ***WITHDRAWN OBJECTIONS***

3. The objection to claim 2 made of record in paragraph 12 of Paper 9 has been withdrawn due to Applicant's amendment made in claim 2 in Paper 10.

### ***REPEATED REJECTIONS***

4. The 35 U.S.C. 112 rejection of claim 12 made of record in paragraph 13 of Paper 9 has been repeated. While the basis of the rejection in regard to the term "closure" (i.e. the first four lines of page 4 of Paper 9) has been withdrawn due to Applicant's amendments to claim 12 in Paper 10, the phrase "an outer layer defining sides and an interior volume" as the language of the second line of claim 12 was amended in Paper 10 also renders the claim indefinite because the structure intended to be recited by this phrase cannot be ascertained: "sides" of what? An "interior volume" of what? The rejection in regard to the phrase "vapor transmission rate" has also been repeated because the kind of vapor is not recited as made of record in paragraph 13 of Paper 9. Applicant argues that "one skilled in the art of packaging appreciates that "vapor" always refers to water vapor which is the environmental agent associated with packaged product degradation", but the term "vapor" refers to any form of matter that is in the gaseous state. Water

vapor is by no means the only vapor that “one skilled in the art of packaging” encounters in the broad field of packaging.

5. The 35 U.S.C. 103 rejection of claims 1-5 over Saad et al. in view of Satoh et al. has been repeated for the reasons previously made of record in paragraph 14 of Paper 9.

6. The 35 U.S.C. 103 rejection of claim 11 over Omura et al. in view of Satoh et al. has been repeated for the reasons previously made of record in paragraph 15 of Paper 9.

7. The 35 U.S.C. 103 rejection of claim 12 over Narsutis et al. in view of Satoh et al. and in further view of Omura et al. has been repeated for the reasons previously made of record in paragraph 16 of Paper 9 and for the following reasons that address the amendments made to claim 12 in Paper 10: Narsutis et al. teach a resealable package (item 10, Fig. 1) comprising an outer layer defining sides (items 12, 14, 16 and 18, Fig. 1-3) and an interior volume (see, for example, Fig. 3, 7, 15 and 22) (col. 4, line 66-col. 5, line 7 and col. 5, lines 19-23). Narsutis et al. also teach that the resealable package comprises a flap (item 30, Fig. 1 and 5) extending from at least one of the sides (the side labeled item 16 in Fig. 1, also see right side of Fig. 3). Narsutis et al. teach that the flap is adapted to fold against the outer layer (see Fig. 1 and 3). Note that it has been held that the recitation that an element is “adapted to” perform a function is not a positive limitation but only requires the ability to so perform. *In re Hutchison*, 69 USPQ 138.

#### ***ANSWERS TO APPLICANT’S ARGUMENTS***

8. Applicant’s arguments on pages 7-9 of Paper 10 regarding the 35 U.S.C. 103 rejection of claims 1-5 over Saad et al. in view of Satoh et al. have been fully considered but are not persuasive.

Applicant argues that “Saad et al. is quite explicit in being relevant only to coextrusion of multi-layer films”, but the method of forming the packaging laminate is not germane to the issue of patentability of the packaging laminate itself. The structure of the multilayer film claimed by Applicant in the instant application is taught by the combination of Saad et al. and Satoh et al. as proposed in the Office Action (Paper 9), regardless of the preferred process of production of the respective films of Saad et al. and Satoh et al. Applicant alludes to the Comparative Example at col. 4, lines 40-53 of Saad et al. but this teaching doesn’t apply to the inventive laminate of Saad et al. since it is a “Comparative Example” that is being compared to the inventive laminate of Saad et al.; furthermore Applicant states that VOC (“volatile organic component”) volatilization (see page 2, line 1 of Applicant’s specification) “is the perceived problem aimed to be corrected by both Saad et al. and the pending application”, but the limitations on which the Applicant relies (i.e. the “correct[ion]” of the “perceived problem” of VOC volatilization) are not stated in the claims. It is the claims that define the claimed invention, and it is the claims, not specifications that are anticipated or unpatentable. *Constant v. Advanced Micro-Devices Inc.*, 7 USPQ2d 1064. Applicant’s statement that “Saad et al. nowhere teaches a structure formation other than through blown coextrusion” is irrelevant; Saad et al. teaches the structure claimed in claim 1 with the exception of the curing agent in the adhesive layer as stated at the top of page 5 of Paper 9.

Applicant’s arguments in the first eight lines of the first full paragraph on page 8 of Paper 10 are irrelevant because they depend on the respective processes that Saad et al. and Satoh et al. use to form the respective films of Saad et al. and Satoh et al. Applicant states that “applying the process of Satoh et al. to the system of Saad et al approaches the comparative example of Saad et al. where escape of antioxidant is observed” is conjecture; furthermore, Applicant’s use of the

term “approaches” suggests that the processes are in fact different and therefore, can’t be equated. Applicant states that Saad et al. “identifies volatilization of antioxidant, namely BHT or BHA, as a limitation of the prior art”, but this is implied provided the condition that “high levels of volatile antioxidants” are present in the packaging material (col. 1, lines 18-20); it is not the volatilization of antioxidant itself that is implied to be a problem by Saad et al., but the high amount of antioxidant that is sometimes incorporated into packaging material is implied to be a problem by Saad et al.

Starting at the thirteenth line of page 8 of Paper 10, Applicant argues that the reason that the disclosure of Satoh et al. cannot be used to modify the structure explicitly taught by Saad et al. is that “the heating of the adhesive coating solution of Satoh et al. to 200°C or above” “induce[s] significant volatilization of BHT or BHA”, this temperature (200°C or above) is only disclosed in regard to situations when the substrate is an “unoriented or monoaxially oriented... polyamide film substrate” (col. 18, lines 8-14). Saad et al. does not disclose that the inner or outer layer is a polyamide; therefore, the teaching that “the heating of the adhesive coating solution of Satoh et al. to 200°C or above” to which Applicant refers is irrelevant to the outstanding rejection of claims 1-5. Satoh et al. actually teaches that “the temperature is set to 80°C-250°C” (col. 17, lines 49-51) and that “longer drying hours can bring about sufficient self-crosslinking property even at a relatively lower temperature” (col. 17, lines 52-54). Therefore, Applicant’s assertion that “the teachings of Saad et al. and Satoh et al. are incompatible as a combination to render the present invention obvious” that is based on an alleged incompatibility between the processes of forming the respective films of Saad et al. and Satoh et al. is both incorrect as

discussed immediately above and irrelevant since the method of forming the packaging laminate is not germane to the issue of patentability of the packaging laminate itself.

Contrary to Applicant's argument that "EVA cannot be acting as an adhesive", the EVA layer of Saad et al. is necessarily an adhesive layer because it is situated between the outer and inner layers of Saad et al. and bonds the outer and inner layers of Saad et al. together. Applicant argues that the EVA layer is not an adhesive layer because the control layer of Saad et al. (corresponding to the inner layer as claimed by Applicant) is optional; however, in the embodiment taught by Saad et al. wherein the control layer is present (which is necessarily the embodiment relied upon in the rejection of claims 1-5, see paragraph 14 of Paper 9) the EVA layer of Saad et al. is necessarily an adhesive layer because it is situated between the outer and control layers of Saad et al. and bonds the outer and control layers of Saad et al. together. The control layer is necessarily present to arrive at the structure recited in Applicant's claims 1-5 since the control layer is the inner layer as claimed as made of record in paragraph 14 of Paper 9. Applicant argues that the EVA layer of Saad et al. has "little or no adhesive tack", but the limitations on which the Applicant relies (i.e. adhesive tack) are not stated in the claims. It is the claims that define the claimed invention, and it is the claims, not specifications that are anticipated or unpatentable. *Constant v. Advanced Micro-Devices Inc.*, 7 USPQ2d 1064. The proposed material substitution (the adhesive layer of Satoh et al. in place of the adhesive EVA layer of Saad et al.) is warranted because the adhesive layer of Satoh et al. and the adhesive EVA layer of Saad et al. both perform the equivalent function of joining the two layers that sandwich the adhesive layer together.

9. Applicant's arguments on pages 9-10 of Paper 10 regarding the 35 U.S.C. 103 rejection of claim 11 over Omura et al. in view of Satoh et al. have been fully considered but are not persuasive.

Applicant's assertion that a drying temperature of 200°C or above is taught by Satoh et al. as "necessary" (third-to-last line of page 9 of Paper 10) is incorrect as discussed above; therefore, Applicant's argument in the last paragraph of page 9 of Paper 10 and the first paragraph of page 10 of Paper 10 is moot. As stated above, Satoh et al. actually teaches that "the temperature is set to 80°C-250°C" (col. 17, lines 49-51) and that "longer drying hours can bring about sufficient self-crosslinking property even at a relatively lower temperature" (col. 17, lines 52-54).

10. Applicant's argument on page 10 of Paper 10 regarding the 35 U.S.C. 103 rejection of claim 12 over Narsutis et al. in view of Satoh et al. and in further view of Omura et al. have been fully considered but are not persuasive.

Applicant's argument relies entirely on Applicant's arguments in regard to the combination of Omura et al. and Satoh et al. that were addressed above in the response to Applicant's arguments in regard to the 35 U.S.C. 103 rejection of claim 11 over Omura et al. in view of Satoh et al.

### ***Conclusion***

11. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Walter B. Aughenbaugh whose telephone number is 703-305-4511. The examiner can normally be reached on Monday-Thursday from 9:00am to 6:00pm and on alternate Fridays from 9:00am to 5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached on 703-308-4251. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9310.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

wba      WBA  
10/23/03

  
HAROLD PYON  
SUPERVISORY PATENT EXAMINER  
1772

11/3/03